



2011

## Taking Adverse Actions Based on Suitability Issues

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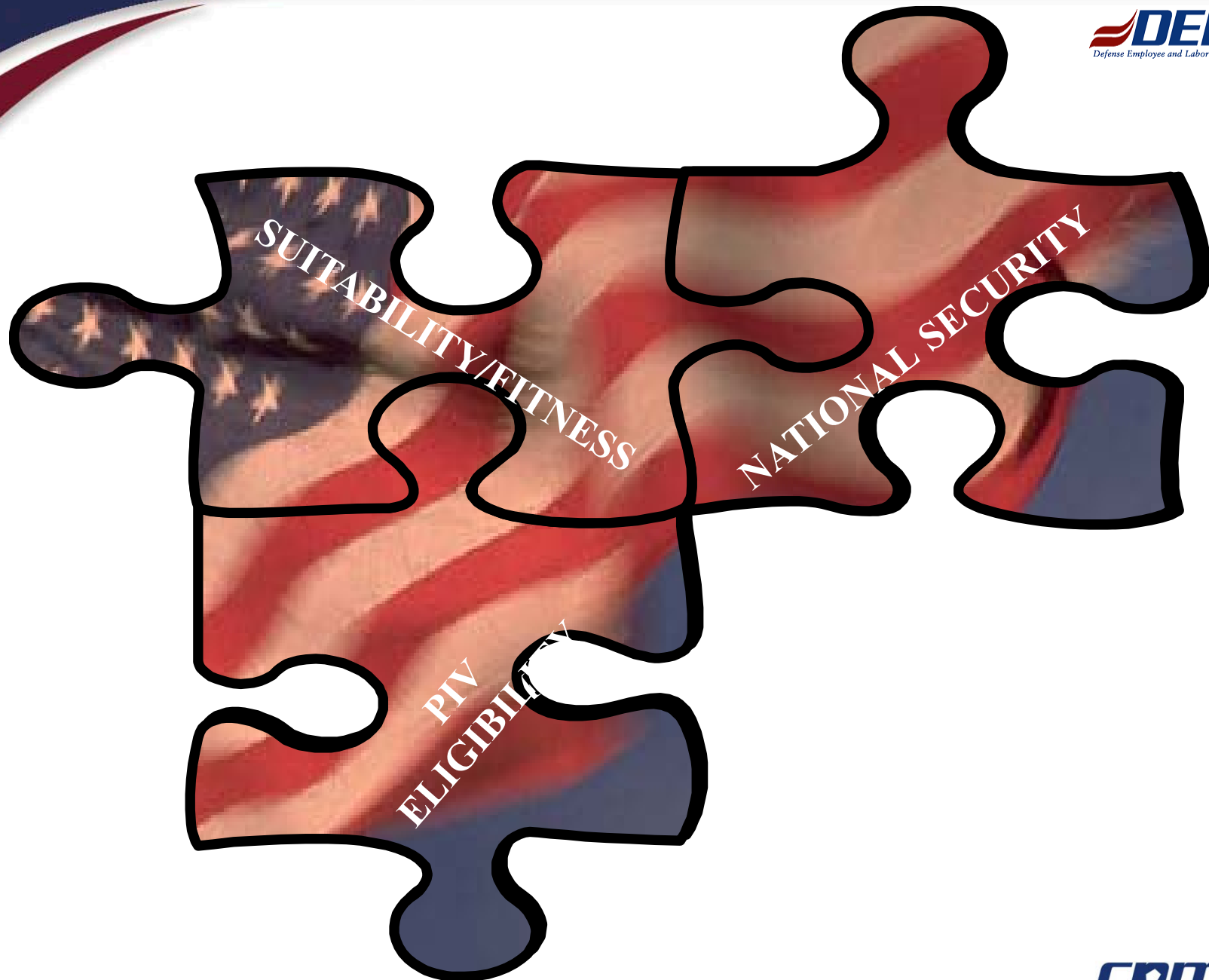
# Objectives

- Discuss the various purposes for personnel investigations
- Discuss the distinctions between Credentialing, Suitability, and Security policies and guidance
- Outline agency authorities and options for adjudication
- Procedural requirements for taking actions when suitability issues arise

# Purposes of Personnel Investigations

- Requirement for access to Federal facilities and logical systems
  - Eligibility for a Personal Identification Verification (PIV) card as mandated by HSPD 12
- Need to evaluate character and conduct of Government workers
  - Suitability determinations for positions covered by 5 CFR 731
  - Continuous evaluation through reinvestigation of individuals in positions of public trust as required by E.O. 13488
  - National Security determinations





**National  
Security**

**Suitability/Fitness/  
Public Trust**

**Facility and Logical Access**

## What is HSPD-12?

- Mandatory, Governmentwide standard for a secure and reliable form of identification issued by the Federal Government for employees and contract employees
  - Physical access to Federally controlled facilities
  - Logical access to Federally controlled information systems
- Requirements established in Federal Information Processing Standards (FIPS) publication 201-1
  - Completion and successful adjudication of National Agency Check with Written Inquiries investigation or other investigation as required for Federal employment

# HSPD-12 Adjudication

- 7/31/08 Final Credentialing Standards for Issuing PIV Cards under HSPD-12 issued by OPM
- No PIV card may be granted if:
  - Known or reasonable suspicion of terrorism
  - Unable to verify identity
  - Fraudulent identity information submitted
  - Reasonable belief attempt will be made to gain unauthorized access to sensitive or protected information
  - Reasonable belief credential will be used unlawfully or inappropriately
  - Reasonable belief individual will use Federally-controlled information systems unlawfully, make unauthorized modifications, corrupt or destroy, or inappropriately use such systems



# HSPD-12 Adjudication

- Agencies may use Supplemental Credentialing Standards when position is not covered by other adjudicative criteria. These include reasonable basis to believe there is an unacceptable risk due to:
  - Misconduct or negligence in employment
  - Criminal or dishonest conduct
  - Material, intentional false statement, deception or fraud
  - Alcohol abuse without substantial rehabilitation
  - Illegal use of narcotics, drugs, or other controlled substances without substantial rehabilitation
  - Statutory or regulatory bar
  - Willful engagement in acts or activities designed to overthrow the U.S. Government by force
- Equivalent to suitability factors in 5 CFR 731

# What is Suitability?

**“Suitability” refers to a person’s identifiable character traits and conduct sufficient to decide whether employment or continued employment would or would not protect the integrity or promote the efficiency of the service**

# Suitability Requirements

- Code of Federal Regulations (5 CFR 731) establishes criteria and procedures for suitability investigations, determinations, and actions
- Covered positions include only:
  - Competitive service positions
  - Career appointments in the Senior Executive Service
  - Excepted service positions that can be non-competitively converted to competitive service
- Suitability investigations are conducted under this authority for all covered positions. Agency suitability actions under 5 CFR 731 are limited to applicants and appointees

# Suitability Risk Levels

- High Risk (HR)
  - Moderate Risk (MR)
  - Low Risk (LR)
- } Public Trust Positions

**Level of investigation depends on  
risk level of position**

# Suitability Investigations

- All covered positions require background investigations unless:
  - The person has already undergone an investigation; **and**
  - Is being appointed, converted, or transferred with one year of continuous service; **and**
  - Has been previously determined suitable or fit under criteria equivalent to 5 CFR 731 (adequate assurance of suitability for covered positions, as determined by OPM)
- When the above conditions apply, investigation is still permitted when:
  - Position requires higher level of investigation
  - New information raises suitability questions

# Suitability Reinvestigations

- E.O. 13488 established authority to reinvestigate persons in positions of public trust
- Issues developed in reinvestigations must be evaluated to determine whether or not the person's continued employment promotes the efficiency of the service
- However, agencies have no jurisdiction to take actions on employees (continuous service for more than a year) under 5 CFR 731. Any necessary action, must be taken under other agency authority (e.g., 5 CFR 752)

# Reciprocity of Suitability Determinations

- No new suitability determination when person already determined suitable or fit based on character or conduct unless:
  - New investigation is required because the position requires a higher level of investigation than previously conducted
  - New information calls suitability into question
  - Investigative record shows conduct that is incompatible with core duties of position
- Favorable decisions on cases with issues should be reviewed and re-adjudicated if warranted
- Agencies cannot appoint an individual to a position covered by 5 CFR 731 when the person is under an OPM debarment

# What is Fitness?

**“Fitness” refers to the level of character and conduct determined necessary for an individual to perform work for, or on behalf of, a Federal agency as an employee in the excepted service (other than in a position subject to suitability) or as a contractor employee**

- Excepted service positions are covered by 5 CFR 302
- Contracts should specify investigative and adjudicative requirements for contract employees



# Establishing Fitness Criteria

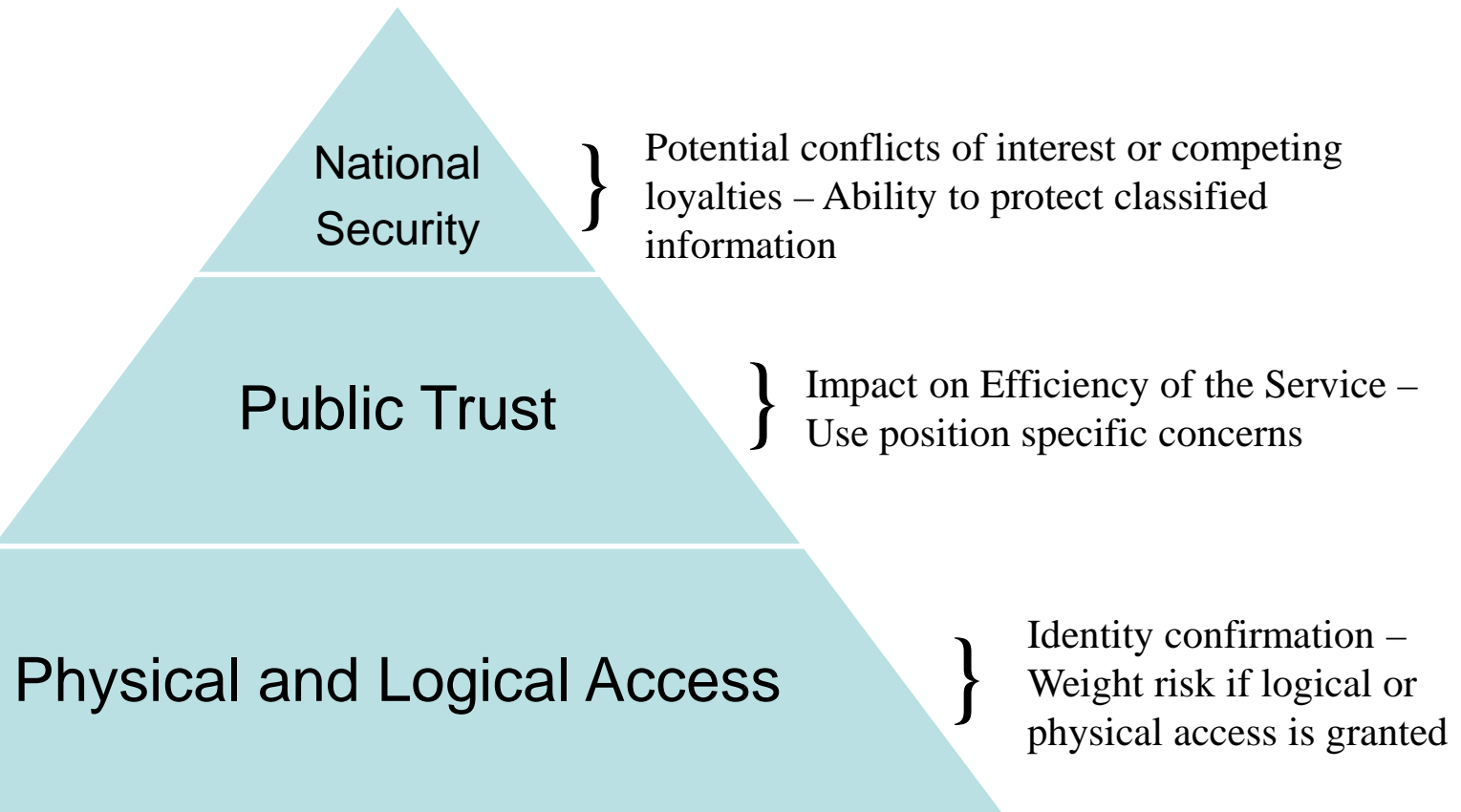
- Agency heads have the authority to establish fitness criteria and make fitness determinations based on them
- Agency heads have discretion to determine if their criteria is equivalent to suitability standards under 5 CFR 731
- Agency heads shall take into account OPM guidance when determining whether their criteria is equivalent

# Reciprocity for Fitness Determinations

- **When reciprocity is required:**
  - Gaining agency uses equivalent criteria
  - Prior fitness/suitability determination based on equivalent criteria
  - No break in service
- **When reciprocity does not apply:**
  - New investigation is required
  - New information calls fitness into question
  - Conduct incompatible with core duties of position
- **Favorable decisions on cases with issues should be reviewed and re-adjudicated if warranted**

# What is Security?

**“Security” refers to a reasonable expectation that the employment or continued employment of an individual would or would not be clearly consistent with the interests of National Security**



# Suitability and Security Criteria Comparison

| SUITABILITY/FITNESS  | NATIONAL SECURITY  |
|--|--|
| Alcohol abuse without evidence of substantial rehabilitation   | Alcohol consumption  |
| Illegal use of narcotics, drugs or other controlled substance without evidence of substantial rehabilitation | Drug involvement   |
| Statutory or regulatory bar  | No specific aligned criteria   |
| Acts or activities to overthrow the U.S. Government by force   | Allegiance to the United States  |
| No specific aligned criteria unless there are character and conduct issues that fit into the criteria above  | Foreign Influence<br>Foreign Preference<br>Sexual Behavior<br>Psychological Conditions<br>Outside activities |

# Suitability and Security Criteria Comparison

| SUITABILITY/FITNESS                                 | NATIONAL SECURITY  |
|---|--|
| Misconduct or negligence in employment              | Personal Conduct<br>Handling Protected Information<br>Use of Information Technology Systems                  |
| Criminal or dishonest conduct                       | Criminal Misconduct<br>Personal Conduct<br>Financial Considerations<br>Use of Information Technology Systems |
| Material, intentional falsification/deception/fraud | Personal Conduct   |

# Suitability/Fitness vs. Security

| SUITABILITY/FITNESS  | SECURITY  |
|--|---|
| <p><b><u>Objective</u></b> – The examination of individual personal character and conduct</p> <p><b>Suitability</b> – Would the person’s employment in a covered position promote the efficiency and protect the integrity of the Service?</p> <p><b>Fitness</b> – Does the person have the <u>required level of character and conduct</u> necessary to perform work for or on behalf of a Federal agency?</p> | <p><b><u>Objective</u></b> – A determination regarding whether employment would constitute a risk to National Security. Influences such as foreign associates or ties are also considered in this determination</p> <p>Does the person have <u>personal conduct or influences</u> that could affect or potentially affect his or her trustworthiness?</p> |

# Suitability Adjudication Under 5 CFR 731

| <i><b>OPM retains authority to adjudicate:</b></i>  | <i><b>Agencies have delegated authority to adjudicate:</b></i>  |
|---|---|
| Covered <b>applicants, appointees and employees</b> with evidence of material, intentional falsification, refusal to furnish testimony, or cases in which Governmentwide debarment is warranted | Covered <b>applicants and appointees</b> , <u>unless</u> there is evidence of material, intentional falsification or refusal to furnish testimony<br><br>Note: No prior approval is needed, but notification to OPM is required, for actions taken by agencies under other authority (5 CFR 315, 5 CFR 359, or 5 CFR 752) |



# Agency Delegated Adjudicative Authority

- Agencies may begin to determine an applicant's suitability at any time during the hiring process
- Agencies must refer cases warranting Governmentwide debarment to OPM
- Agency authority is subject to revocation by OPM

# Suitability Standards and Criteria

## 5 CFR 731.201 and 202

- A suitability action taken against an applicant, appointee, or employee will protect the integrity or promote the efficiency of the service
- Suitability determinations must be based on the presence or absence of one or more specific factors (charges)
- Only the eight specific factors outlined on the following slides are considered a basis for finding a person unsuitable and taking a suitability action

# Specific Suitability Factors

## 1. **Misconduct or negligence in employment**

- Inability to perform and other qualification issues are not suitability issues

## 2. **Criminal or dishonest conduct**

- Financial irresponsibility is included only if dishonesty is established

## 3. **Material, intentional false statement, or deception or fraud in examination or appointment\***

- A “material” statement is one that is capable of influencing, affects, or has a natural tendency to affect an official decision, even if OPM or an agency does not rely upon it

# Specific Suitability Factors (cont.)

## 4. Refusal to furnish testimony as required by 5 CFR 5.4\*

- Limited to testimony required by the Office of Personnel Management, Office of the Special Counsel, or Merit Systems Protection Board

\* Only OPM can cite this factor

# Specific Suitability Factors

- 5. Alcohol abuse, without evidence of substantial rehabilitation, of a nature and duration that suggests that the applicant or appointee would be prevented from performing the duties of the position in question or would constitute a direct threat to the property or safety of the applicant or appointee or others\***
- 6. Illegal use of narcotics, drugs or other controlled substances without evidence of substantial rehabilitation\***

\* Neither factor applies if there is clear evidence of substantial rehabilitation (measurable efforts and noticeable results)

# Specific Suitability Factors

- 7. Knowing and willful engagement in acts or activities designed to overthrow the United States Government by force**
  - Membership in an organization, alone, is not disqualifying
- 8. Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question**
  - There must be a specific legal restriction to employment

# Additional Considerations

**OPM and agencies must consider the listed additional considerations to the extent OPM or the relevant agency, in its sole discretion, deems any of them pertinent to the individual case**

# Additional Considerations

## 1. Nature of the position

- The more authority, responsibility, sensitivity and public trust associated with the position, the higher the risks involved and the more potential adverse impact there is
- Consider **Core duties** – continuing responsibility of particular importance to the relevant covered position or the achievement of an agency's mission



# Nature of the Position

## Examples of core duties

- Law Enforcement positions - sale of narcotics
- Fiduciary positions - embezzlement
- Motor Vehicle Operator - habitual traffic offender
- Computer Security Manager - using company computer to access porn sites
- Staffing Specialist - prohibited personnel practices

NOTE: LIST IS NOT ALL-INCLUSIVE

# Additional Considerations

## **2. Nature and seriousness of the conduct**

- The more serious the conduct, the greater the potential for disqualification

## **3. Circumstances surrounding the conduct**

- Full facts and circumstances are essential to insure justice to the person and to protect the interests of the Government

# Additional Considerations

## **4. Recency of the conduct**

- The more recent the conduct is, the greater the potential for disqualification

## **5. Age of person at time of conduct**

- Offenses committed as a minor may be less serious than those committed as an adult
- Not normally pertinent if conduct is very recent, part of a pattern or particularly heinous

# Additional Considerations

## 6. Contributing societal conditions

- Economic and cultural conditions might be a mitigating factor if the conditions are now removed

## 7. Absence or presence of rehabilitation or efforts toward rehabilitation

- Time elapsed since conduct last occurred (no set time frame; must be considered in tandem with other factors)
- Results of treatment/counseling; prognosis and past history of treatment
- Other aspects of the individual's life, such as stable employment record, positive changes in personal life, etc.

# Origins of Suitability Issues

- Application or appointment forms
- Interviews/examinations
- Pre-employment inquiries\*
- Investigative data forms
- Personal subject interview (PRSI)
- Investigation

\* Reference checks are a vital part of the hiring process that can identify problem areas early.

# What is NOT a Suitability Action?

- Non selection, including
  - the cancellation or rescission of a tentative offer for a single position
  - cancellation of eligibility for a specific position based on an objection to an eligible or pass over of a preference eligible under 5 CFR 332.406

is not a suitability action even if it is based on the criteria for making suitability determinations set forth at 5 CFR 731.202

- Non-selection, objection to eligibility, or pass-over of preference eligible candidate decisions are not appealable to the Merit Systems Protection Board
- Actions taken under other adjudicative authorities

# Suitability Determinations and Actions

- A suitability action (defined at 5 CFR 731.203) is an outcome taken by OPM or an agency under the procedures of 5 CFR 731, including:
  - Cancellation of eligibility
  - Removal
  - Cancellation of reinstatement eligibility
  - Debarment

# Debarment by OPM and Agencies

- OPM may deny a person examination for, or appointment to, all covered positions for up to 3 years (Governmentwide)
- Agencies may deny a person examination for, or appointment to, all or specific covered positions within the agency for up to 3 years (Agency-specific)
- An additional period of debarment may be imposed by OPM or an agency
  - Person must again be an applicant or appointee for a covered position and 5 CFR 731 procedures must be followed
  - May be based in whole or in part on the same conduct or new conduct



# Part 731 Procedural Requirements

- **Proposed Action**

- Must give reasonable notice to subject in writing, stating specific reasons
- Must notify subject of right to “materials relied upon”
- Must inform subject of time limits for response and right to respond in writing
- Must retain subject in pay status during response time, if employed
- Must advise subject of right to representation

- **Respondent's Answer**

- May answer charges in writing
- May furnish documentation and/or affidavits

# Part 731 Procedural Requirements

## Final Decision

- Must be in writing and dated
- Must inform respondent of reasons for decision
- Must give appeal rights to MSPB
- Removal is effective within five workdays following the date of the decision

# Is the Decision/Action Reviewable?

**Employees/Appointees may appeal an unfavorable suitability determination to the Merit Systems Protection Board**

The procedures for filing an appeal with the Board are found at 5 CFR part 1201

# Reporting

- Agencies must report all actions taken as a result of an OPM suitability investigation
- Agencies must report to OPM when they believe a Governmentwide debarment might be appropriate in a specific case
- Agencies must provide information about the level and result of each background investigation, suitability determination, and suitability action taken to OPM

# Taking actions under other authorities

- When the agency does not have authority to take an action under 5 CFR 731, the agency can still take a disciplinary action under another authority to address behavior covered by 5 CFR 731
- When an agency uses another authority, the removal action is not considered to be a suitability action, even if it is based on suitability factors in accordance with 5 CFR 731
- Agencies taking actions under other authorities are required to follow procedural requirements of that authority, even when taking an action based on behavior covered by 5 CFR 731

## Other Adjudicative Authorities

- 5 CFR 315 – Competitive Service probationary employees
- 5 CFR 359 – SES probationary employees
- 5 CFR 752 – Adverse actions (employees past probationary period, etc.)

# Fact or Myth ?

1. Rehabilitative efforts, the person's age at the time of the conduct, the recency of the conduct, and the nature and circumstances surrounding the conduct may be pertinent considerations in both suitability and security adjudications.
2. The duties and responsibilities of the position sought often influence the outcome of a suitability decision

**MYTH** 3. For positions covered by 5 CFR 731, no suitability determination is required if a clearance eligibility has been established

# Fact or Myth ?

1. An individual need not be fired from a job before the suitability factor, Misconduct or Negligence in Employment, applies
2. Rules and regulation violations, misuse of government resources, disruptive behavior in the workplace and breaches of employer's confidentiality may impact on security as well as suitability

**MYTH** 3. Refusal to complete the necessary forms to conduct a suitability investigation is a disqualifying suitability issue



# Fact or Myth ?

1. Recent serious criminal convictions would generally be disqualifying for both suitability and National Security reasons
2. A PIV card will not be issued if there is reasonable basis to believe it will be used unlawfully outside the workplace

**MYTH** 3. A felony conviction, regardless of its age, precludes Federal employment in any position

# Fact or Myth ?

**MYTH**

1. A person's inability to pay just debts may be disqualifying for suitability reasons
2. Unwillingness to settle outstanding financial debts of a significant nature may be disqualifying under suitability criteria related to dishonest conduct
3. Affluence that cannot be explained by known sources of income is a security concern

# Fact or Myth ?

- MYTH** 1. Under the criteria for suitability adjudication, falsification may be mitigated if the falsified matter is voluntarily disclosed in the Personal Subject Interview
2. A claimed degree that is not verified may constitute a "material false statement" as defined in the suitability regulations, even if there was no degree required for the job
3. In assessing character and conduct to make a suitability determination, favorable performance on the job is not a mitigating factor if the employment was obtained by fraud

# Fact or Myth ?

1. One example of a statutory or regulatory bar is the provision in Title 18 of the US Code that precludes employment in positions requiring transportation of ammunition if an individual has been convicted of a misdemeanor domestic violence offense.

**MYTH** 2. The adjudicative Guidelines for Determining Eligibility for Access to Classified Information cover all issues related to statutory or regulatory bars

3. An individual has the right to respond to a proposed suitability action taken under 5 CFR 731 on the basis of statutory or regulatory bar.

# Fact or Myth ?

1. Failure to report association with a foreign national, when required, may be a suitability issue
- MYTH** 2. The potential impact of foreign influences and preferences must be considered in determining a person's suitability for Federal employment
3. Involvement in acts or activities designed to overthrow the US Government by force is both a suitability and a security issue.

# Fact or Myth ?

1. Suitability adjudicators must evaluate whether or not there is substantial evidence of rehabilitation before taking a suitability action based upon drug or alcohol abuse
2. Impaired judgment due to alcohol consumption or use of drugs if a security concern and can raise questions about an individual's reliability and trustworthiness
- MYTH** 3. In suitability adjudication, possession of narcotics falls under the specific suitability factor related to drugs

# Questions?

# Contact Information

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